No. 82-1390

In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD N. ASHLEY, ET AL., PETITIONERS

v.

CITY OF JACKSON, MISSISSIPPI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' challenge to the operation of an existing consent decree should be filed with the district court that has continuing jurisdiction over the enforcement of the decree and not in a separate law suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-6A) is reported at 687 F.2d 66. The opinion of the district court (Pet. App. 12A-13A) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1982. An order denying rehearing (Pet. App. 7A-8A) was entered on November 19, 1982. The petition for a writ of certiorari was filed on February 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 25, 1974, consent decrees were entered in the cases of *United States* v. *City of Jackson*, Civil Action No. J-74-66(N) (S.D. Miss.), and *Corley* v. *Jackson Police Department*, Civil Action No. 73J-4(C) (S.D. Miss.), which

were suits challenging, *inter alia*, the City's hiring and promoting practices in its police department (Pet. App. 1A-2A). The decrees themselves established certain objectives for the City of Jackson in its hiring and promotion of city employees (*ibid.*). The district court in entering the decrees expressly retained jurisdiction over the cases "for such further relief or other orders as may be appropriate" (*id.* at 2A).

In 1976 and 1978, petitioners, seven white residents of the City of Jackson, filed separate complaints against the City, which were later consolidated by the district court, alleging that the City had discriminated against them by hiring or promoting less qualified blacks instead of petitioners solely on the basis of their race (Pet. App. 1A).[1] In their complaints, petitioners expressly referred to the consent decrees and claimed a right to "seek and obtain relief inconsistent with the terms of [the decrees]." See First Amended and Supplemental Complaint at 8, *Ashley* v. *City of Jackson*, Civil Action No. J76-70(R) (S.D. Miss. July 11, 1978); Complaint at 6, *Thaggard* v. *City of Jackson*, Civil Action No. J78-0218(C) (S.D. Miss. May 22, 1978).[2] The United

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[1]Petitioners filed related state court actions in 1976 and 1977, challenging the City of Jackson's employment practices. Petitioners were, however, enjoined by the consent decree court from proceeding with these actions on the ground that the relief sought was inconsistent with and might obstruct or interfere with the enforcement and implementation of the decrees. An appeal of this injunction was initiated, but was later dismissed for want of prosecution.

In 1977 and 1978, petitioners also filed motions for leave to intervene in the consent decree suits themselves in order to challenge those decrees on their face. The United States opposed the motions on the grounds that they were untimely, asserted interests already adequately represented by the defendant City, sought to raise legally insubstantial issues and would unduly complicate completed litigation and thus constitute a substantial interference with the orderly process of justice. All of the motions were denied, and none of the denials was appealed.

[2]A copy of both complaints is being lodged with the Court.

States intervened and moved to dismiss on the ground that petitioners' complaints constituted collateral attacks on the earlier consent decrees and thus were improperly brought in a separate proceeding (Pet. App. 2A).

After a hearing, the district court determined that petitioners' suits "are reverse discrimination suits which challenge the hiring and promotional practices of the City of Jackson" (Pet. App. 12A). The court further determined that "[t]he practices complained of are the result of consent decrees which were entered * * * in [*City of Jackson* and *Corley*]" (*ibid.*). The court concluded that petitioners' suits constituted collateral attacks on preexisting decrees over which a different court had continuing jurisdiction and thus dismissed the suits for lack of subject matter jurisdiction (*id.* at 13A-14A).

2. The court of appeals affirmed (Pet. App. 1A-6A). The court determined that although, "[i]n form, [petitioners'] arguments appear to implicate something other than the consent decrees themselves [,] * * * the substance of [petitioners'] position reveals * * * that the consent decrees are indeed implicated, and [petitioners'] complaints constitute collateral attacks upon the decrees" (*id.* at 3A). The court reiterated, quoting *Dennison* v. *City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981), that " '[i]t is settled that a consent decree is not subject to collateral attack' " (Pet. App. 3A).

ARGUMENT

1. Petitioners challenge (Pet. 15-16) the correctness of the decision of the courts below dismissing their discrimination claims without considering their merits. This claim is not worthy of review by this Court. Every court of appeals that has addressed the issue has concluded that where, as here, a consent decree has been entered by a district court and the district court has retained jurisdiction over its operation, objections to or questions regarding the validity of

the decree cannot be litigated through independent lawsuits. *Dennison* v. *City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981); *Culbreath* v. *Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980); *Black and White Children* v. *School District*, 464 F.2d 1030 (6th Cir. 1972); *Prate* v. *Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), aff'd mem., 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978); *O'Burn* v. *Shapp*, 70 F.R.D. 549 (E.D. Pa.), aff'd mem., 546 F.2d 418 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977).[3]

These decisions are plainly correct. To permit independent lawsuits challenging the validity of consent decrees over which a court has retained jurisdiction would foster an unnecessary proliferation of lawsuits, create a needless danger of inconsistent or contradictory adjudications, and create uncertainty as to a decree's validity and finality. See *Dennison* v. *City of Los Angeles*, *supra*, 658 F.2d at 696; *O'Burn* v. *Shapp*, *supra*, 70 F.R.D. at 552. The rule against collateral attacks is necessary and appropriate to enable the court, which has approved the entry of the decree and is thus in the best position to judge whether changed circumstances warrant its modification, to ensure the decree's just and orderly implementation.

2. In addition to requesting review of the general rule against collateral attacks on consent decrees, petitioners also ask (Pet. 18-22) the Court to review the district court's specific conclusion, affirmed by the court of appeals, that petitioners' suits are in fact collateral attacks on the *Corley* and *City of Jackson* consent decrees (Pet. App. 3A-4A;

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[3]Because it is jurisdictional in nature, the rule obviously controls regardless of the validity of the contentions sought to be litigated. Thus, the district court here quite properly did not consider or discuss the merits of petitioners' contentions as to the *Corley* and *City of Jackson* decrees; nor did the court of appeals. Although petitioners persist in arguing the merits at length in their petition (Pet. 23-28), they are not properly before the Court and accordingly we do not address them.

id. at 12A-13A). This case-specific issue clearly does not warrant review by this Court. Even a cursory examination of petitioners' complaints shows conclusively that the courts below were correct in their evaluation of the nature of petitioners' lawsuits.

3. Contrary to petitioners' contention (Pet. 22-23), the decision of the court of appeals in no way deprived them of a reasonable opportunity to assert their reverse discrimination claims. They can always move to intervene directly in the consent decree suits and seek relief in that forum; that is the proper, and fully adequate, procedural recourse under the circumstances. See, *e.g., Culbreath* v. *Dukakis, supra,* 630 F.2d at 22; *Hines* v. *Rapides Parish School Board,* 479 F.2d 762, 765 (5th Cir. 1973) (footnote omitted) ("proper course for parental groups seeking to question current deficiencies in the implementation of desegregation orders is for the group to petition the district court to allow it to intervene in the prior action"); *Black and White Children* v. *School District, supra,* 464 F.2d at 1030 (The "proper avenue for relief if there were unanticipated problems which had developed in [the] carrying out [of the court's] order was by way of an application to intervene and a motion for additional relief in the principal case"). See generally Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721-723 (1968).[4]

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[4]Of course, for a variety of reasons which would not violate due process, intervention may not always be granted. See, *e.g., Culbreath* v. *Dukakis, supra,* 630 F.2d at 23. For instance, where—as apparently was the case here—intervention is sought in order to challenge the decree facially, it may be that the motion would be properly denied as not timely filed as required by Fed. R. Civ. P. 24. But even in that event, the objector may be able to intervene to complain about the manner in which the decree is being applied to him. Accordingly, petitioners' previous failure to intervene successfully is not necessarily an obstacle to a new challenge based on a different theory.

CONCLUSION

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1983

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[5]Petitioners argue (Pet. 20-22) that petitioner Ashley's Title VII retaliation claim has been improperly lumped with the challenges to the operation of the consent decree and should not have been dismissed. Since this issue is irrelevant to the validity of the consent decree and is properly directed only at the City respondents—there being no allegation that the federal government retaliated against Ashley—we do not comment on this issue.

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